UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON D.C.

MIDWEST TERMINALS OF TOLEDO, INTERNATIONAL, INC., and **OTIS BROWN,** **MIGUEL RIZO, JR.,** **MARK LOCKETT,** and **INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1982.**	Case Nos. 08–CA–038092, 08-CA-038581, 08-CA-038627, 08-CA-063901, 08-CA-073735, 08-CA-092476, 08-CA-097760, and 08-CA-098016 **POSITION STATEMENT OF CHARGING PARTY INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1982**

Now comes Charging Party International Longshoremen's Association, Local 1982 ("Local 1982"), by and through its legal counsel, with its position statement in support of the Complaint issued by the General Counsel for the National Labor Relations Board ("General Counsel"). Local 1982 respectfully requests that the National Labor Relations Board ("Board") reaffirm its decision from March 31, 2015 finding Midwest in violation, on multiple counts, of Sections 8(a)(1), 8(a)(3), and (a)(5) of the National Labor Relations Act ("Act') because: (1) its review must be limited to those few issues already raised by Charged Party Midwest Terminals of Toledo International, Inc. ("Midwest") in its prior decision; (2) the one exception is that Midwest properly preserved the defense of laches, but such a claim does not lie against agencies of the United States government, such as the Board; and (3) the facts and law remain unchanged since the Board's March 31, 2015 decision and the procedural flaw has been remedied. For those reasons, the Charging Party respectfully requests the Board reaffirm its prior decision.

PROCEDURAL FACTS

A charge in this case was first filed on December 30, 2008, but a series of charges were brought by the Charging Party after the original charge due to multiple violations of the Act. Docket of Midwest Terminals of Toledo, Int'l, Case Nos. 08-CA-038092, et al. (hereinafter "Docket"), March 31, 2015, Board Decision, 5-6. This evolving situation and continuing investigation resulted in the issuance of a complaint and several amended complaints which consolidated the matters between the parties. *Id*. Not until March 28, 2013 had the Board completed its investigation and created a final consolidated complaint which resulted in the matter before the Board. *Id*. On July 10-14, 2013 and August 21, 2013, a hearing was held before Administrative Law Judge Mark Carissimi and on November 12, 2013, he issued his decision finding Midwest guilty of several violations of Sections 8(a)(1), 8(a)(3), and (a)(5) of the Act. Docket, November 12, 2013, Administrative Law Judge Decision.

General Counsel and the Charged Party filed exceptions to the administrative law judge's decision and responsive briefing was filed in both instances. See Docket, *passim*. On March 31, 2015, the Board issued its decision affirming the administrative law judge's rulings, findings, and conclusions, save for a small change in reasoning. See Docket, March 31, 2015, Board Decision.

On May 7, 2015, Midwest appealed the Board's decision to the United States Court of Appeals for the District of Columbia ("D.C. Circuit") and the Board filed a cross-application for enforcement. See Docket of *NLRB v. Midwest Terminals of Toledo Int'l. Inc.*, Case No. 15-1168 (D.C. Cir. 2015). Midwest argued that the Board's General Counsel was without authority when he issued a complaint against Midwest and the appeal was placed in abeyance as a case with the same issue was already before the United States Supreme Court. See *Id*., May 19, 2016 entry. The Supreme Court ruled that the Board's General Counsel was indeed without authority when the

complaint was issued so on July 14, 2017, the D.C. Circuit vacated the Board's decision and remanded it to the Board for further proceedings. *Id*., July 14, 2017 Decision. The D.C. Circuit's Mandate was issued that same day. *Id*., July 14, 2017 Mandate Issued. On August 17, 2017, the Board's now-General Counsel ratified the Complaint as initially issued by the former General Counsel. See Docket, August 17, 2017, Letter to ES Office.

ARGUMENT

1. Standard of Review

When a decision is vacated on procedural grounds and remanded to the Board for further proceedings, the Board considers the matter *de novo* when reviewing the decision. See *Gaylord Chem. Co., LLC & United Steelworkers Int'l Union & Its Local 887*, 361 NLRB No. 67 (Oct. 28, 2014). The Board considers both the now-vacated Board decision and the administrative law judge's decision when reviewing the remanded matter. *Id*.; *Lederach Elec., Inc. & Int'l Bhd. of Elec. Workers, Local 380*, 361 NLRB No. 21 (Aug. 19, 2014).

2. The Board's Review of this Matter is Limited by the Doctrine of Waiver and Deference to the Administrative Law Judge's Credibility Determination.

It is axiomatic that a party must cannot raise a new issue on appeal and any issues not raised before the administrative law judge is deemed waived. *Diamond Trucking, Inc.*, 365 NLRB No. 64 (Apr. 25, 2017); See *Yorkaire, Inc.*, 297 NLRB 401, 401 (1989), enfd. 922 F.2d 832 (3d Cir. 1990); see also *Conditioned Air Sys., Inc. & Plumbers & Gas Fitters Local Union No. 5, United Ass'n of Journeymen & Apprentices of the Plumbing & Pipe Fitting Indus. of the United States & Canada, AFL-CIO*, 360 NLRB 789, n.3 (2014). That being the case, the number of arguments Midwest can raise to challenge the Board's now-vacated decision is substantially limited. The precise matter before the Board has been raised and decided on March 31, 2015. The only defense

of Midwest's which was preserved by the D.C. Circuit is the doctrine of laches which is unavailing, as is fully addressed below.

Furthermore, the Board attaches great weight to an administrative law judge's credibility finding. *Standard Dry Wall Prod., Inc.*, 91 NLRB 544, 545 (1950). The Board does not overrule an administrative law judge's resolution as to credibility except where the clear preponderance of *all* the relevant evidence convinces us that the administrative law judge's resolution was incorrect. *Id*.

The arguments the Board can consider are dramatically narrowed at this stage in the litigation, meaning it can only consider arguments it has already heard and cannot alter credibility determinations already made. Only the defense of laches has been properly preserved as a defense by Midwest.

3. Midwest's Defense of Laches is Unavailing as It Cannot be Applied to the Board

In the D.C. Circuit's decision vacating and remanding the Board's decision for further proceedings, it stated that Midwest "may raise its laches argument on remand and seek judicial review if unsatisfied with the result." Docket, July 14, 2017, Circuit Court Order. As such, Midwest has not waived its laches defense.

To apply the doctrine of laches, the asserting party has the burden of proving (1) a lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense. *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 121, 122 S.Ct. 2061, 153 L.Ed.2d 106 (2002); *Pro-Football, Inc. v. Harjo*, 567 F. Supp. 2d 46, 54 (D.D.C. 2008), *aff'd in part sub nom. Pro Football, Inc. v. Harjo*, 565 F.3d 880 (D.C. Cir. 2009).

That said, it has long been observed that the defense of laches does not lie against the Board, because it is an agency of the United States government. *NLRB v. Rutter-Rex Mfg. Co.*, 396

U.S. 258 (1969); *United Elec. Contractors Ass'n a/k/a United Constr. Contractors Ass'n*, 347 NLRB 1, 2–3 (2006); *Roofing, Metal & Heating Assocs., Inc.*, 304 NLRB 155, 160 (1991); *Consolidated Casinos Corp.*, 266 NLRB 938, 992 (1983); *Merrell M. Williams*, 265 NLRB 506, 508 (1982); and *Aircraft Upholstering Co.*, 228 NLRB 462 (1977). "The Board is not required to place the consequences of its own delay, even if inordinate, upon wronged employees to the benefit of wrongdoing employers." *J. H. Rutter-Rex Mfg. Co.*, 396 U.S. at 265.

Here, Midwest is attempting to assert the defense of laches against an entity for which such a defense does not lie; the Board. Even if Midwest's defense could be brought against the Board, which it cannot, it could not carry its burden to apply the doctrine of laches in this instance. Midwest cannot show a lack of diligence by the Board and Local 1982 has been more prejudiced by the delay than Midwest. The delay in the proceedings are as much the fault of Midwest's as it is the Board's as Midwest repeatedly and flagrantly violated the Act, thereby complicating the investigation, and it repeatedly appealed and engaged in delay tactics. The Board drafted numerous consolidated complaints and worked assiduously to bring this dispute to a conclusion. The Board has been diligent in resolving this matter. Additionally, Local 1982 is not aware of any evidence that Midwest has been prejudiced more than if it had it acted lawfully to begin with. In fact, it is Local 1982 which has been prejudiced by the delay by not receiving the dues it is lawfully owed by Midwest. As it cannot bring its defense against the Board, and even it if could, it necessarily falls short of meeting its burden to apply the doctrine, Midwest's defense of laches must fail.

4. The Facts and Law Are Unchanged, Leaving No Justification for an Alteration in the Board's Determination

Local 1982 is unaware of any new facts, evidence, or change in the law that could justify a change in the Board's determination. Furthermore, the Board has striven to ensure that it provides consistent results so employers, labor organizations, and employees know what is expected of

them and count on predictable determinations before the Board. See *In Re Specialty Healthcare & Rehab. Ctr. of Mobile*, 357 NLRB 934, 946 (2011) (trumpeting the virtue of a particular rule because it would provide "more predictable and consistent results"); *Awb Metal, Inc. Div. of Magnode Corp., Employer & United Auto., Aerospace & Agr. Implement Workers of Am., UAW*, 306 NLRB 109 (1992) (declaring the Midland rule a success because it "has proven to be, as predicted, 'a clear, realistic rule of easy application which lends itself to definite, predictable, and speedy results'"). Affirming the now-vacated decision when there is no change in facts or the law is the purest form of providing consistent and predictable results to matters before the Board.

Lastly, the only basis for the Board's previous decision being vacated, its procedural flaw related to the then-General Counsel's lack of authority, has been resolved through ratification. Ratification can remedy a defect arising from an improperly appointed official's decision when the properly appointed official has the power to conduct independent evaluation of merits and does so. *Wilkes-Barre Hosp. Co., LLC v. NLRB*, 857 F.3d 364 (D.C. Cir. 2017); see also *Fed. Election Comm'n v. Nat'l Rifle Ass'n of Am.*, No. CIV. A. 85-1018, 1995 WL 870598, at *2 (D.D.C. Aug. 1, 1995) (finding a government agency well within its power to ratify and pursue a cause of action it had previously been found to be unauthorized to carry out due to the improper composition of the agency). The current Board General Counsel, Richard F. Griffin, Jr. was confirmed on November 4, 2013 and ratified the consolidated complaint that initiated this matter on or around August 17, 2017. Docket, August 17, 2017, Letter to ES Office. As the Board's General Counsel was previously not authorized when litigating this matter before the Board, the ratification of the original complaint by General Counsel Griffin, who has been lawfully confirmed, remedies the D.C. Circuit's procedural reason for vacating the Board's previous determination. As the Board's

General Counsel confirmed that he would have acted precisely as the former General Counsel did, this Board should act precisely as it formerly did and reaffirm its previous decision.

CONCLUSION

The Board's scope of review of its past decision is limited, the only defense available to Midwest cannot be applied to the Board, and the sole procedural flaw of the Board's decision has been remedied. The Board should affirm its past decision and confirm its finding that Midwest had repeatedly violated the Act.[1]

Respectfully submitted,

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[1] Local 1982 incorporates any and all arguments raised by the Board's General Counsel herein by reference.

CERTIFICATE OF SERVICE

I hereby certify that on August 29, 2017, the Position Statement of Charging Party International Longshoremen's Association, Local 1982 was filed using the National Labor Relations Board's electronic filing system. Parties were served the foregoing by email at allen.binstock@nlrb.gov, hotrodlawman@worldnet.att.net, and rmason@maslawfirm.com.

/s/ Matthew T. Hurm
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